

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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AXELROD & CHERVENY ARCHITECTS,
P.C., et al.,

Plaintiff,
-against-

T & S BUILDERS, INC., et al.,

Defendants.

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ORDER
CV 05-5573 (DRH)(ARL)

LINDSAY, Magistrate Judge:

By Order dated May 25, 2007, the undersigned directed that the defendants show cause in writing by June 1, 2007 why their answer should not be stricken due to their failure to comply with two court orders directing the production of supplemental discovery responses. See Orders, dated February 23, 2007 and April 18, 2007.

In response to the May 25th order, the defendants have submitted the affidavit of defendant Salvatore Malguarnera, the President of defendant T&S Builders, Inc. Malguarnera acknowledges that the defendants have failed to provide discovery regarding the defendants' costs and profits in constructing the home that are the subject of this litigation. According to Malguarnera, this financial information does not exist as it was lost when the defendants changed accountants in January 2004. In support of this assertion, the defendants have submitted a letter dated May 31, 2007 from their current accountant, Jeffrey B. Feldman, CPA. Feldman confirms that he took over the accounts of T&S Builders, Inc. and Malguarnera from their previous accountant, Salvatore Marsala, who had represented these clients for approximately 15 years. Feldman represents that, at the time he received the defendants' records from Marsala, information was missing. For example, there were no cost sheets for any of the individual home construction projects and there were "only scant handwritten cash receipt and disbursement journals not reflecting individual project names or locations concerning material and labor costs." According to Feldman, there is no way of reconciling these journal entries with any particular project and, from the records available, there is no way to reconstruct cost sheets or compute the profits made from the sale of the individual homes that are the subject of this litigation.

Given the defendants' response to the May 25th order, the undersigned declines to recommend that the defendants' answer be stricken at this time. The parties are reminded to electronically file their proposed joint pretrial order in advance of the June 15, 2007 final conference.

Dated: Central Islip, New York
June 5, 2007

/s/
ARLENE R. LINDSAY
United States Magistrate Judge